In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:	)	
	)	Adversary Proceeding
CURTIS L. OSBURN	)	
(Chapter 7 Case 96-20870)	)	Number 96-2005
	)	
Debtor	)	
	)	
	)	
	)	
BEVERLY FARMER	)	
	)	
Plaintiff	)	
	)	
	)	
v.	)	
	)	
CURTIS L. OSBURN	)	
	)	
Defendant	)	

MEMORANDUM AND ORDER

This action is a complaint to determine the dischargeability of a debt pursuant to Title 11 U.S.C. Sections 523(a)(5) and (15). Defendant/Debtor, Curtis L. Osburn, has filed for Chapter 7 relief and claims that his obligation owed to Plaintiff, Beverly Farmer, is a property settlement arising out of a divorce decree and, therefore, should be discharged. Plaintiff disputes Defendant's contentions and asserts that even though this obligation is a property settlement the debt should be excepted from discharge pursuant to 11 U.S.C. Section

523(a)(15). This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(I). Pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, this Court held a trial on April 17, 1997, and makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Plaintiff, Beverly Farmer, filed this adversary proceeding pursuant to Section 523(a)(5) on February 1, 1997, objecting to the dischargeability of a debt owed to her by Debtor. Subsequently, Plaintiff moved to amend her petition to object to Debtor's discharge pursuant to Section 523(a)(15). Over the objection of Defendant's counsel, by Order of December 18, 1996, Plaintiff was permitted to amend her petition to state a claim under Section 523(a)(15). On April 17, 1997, this Court held a trial at which time the parties stipulated that the indebtedness in issue is a property settlement and, therefore, the sole issue before this court is whether Debtor's indebtedness to Plaintiff should be declared non-dischargeable pursuant to Section 523(a)(15). The relevant facts are as follows.

On December 7, 1992, the parties were divorced. The separation agreement entered into between the parties was incorporated into the terms of the Final Judgment and Decree and pertinent to this proceeding provided in paragraph three, pages five and six:

> As Wade reaches the age of eighteen (18), then the Seventy Five Dollar (75.00) child support for the child will be converted to a property settlement at the rate of Seventy Five Dollars ($75.00) per week to Mrs. Osburn, and the payment shall be made until January 1, 2006. Payments for Darby shall cease as hereinabove provided.

The parties have two children. As interpreted by both parties, the decree originally provided for Debtor to pay a monthly child support obligation of $75.00 per week per child to Plaintiff until each child reached the age of eighteen.[1] As outlined above, when the parties' oldest child reached the age of eighteen, Debtor would continue to pay Plaintiff $75.00 per week until January 1, 2006, as a property settlement and not child support. No similar provision existed when the second child reached the age of eighteen.

At the time of trial, the oldest child had reached the age of eighteen and the second child turns eighteen in August of 1997. Debtor is current on his child support obligation which will cease in August on his daughter's eighteenth birthday. Debtor's remaining obligation at issue is the continuing $75.00 per week payment to Plaintiff until January 1, 2006.

At trial, the evidence revealed that Plaintiff, Mrs. Farmer, is employed as a school teacher and earns approximately $25,000.00 per year. As revealed by her 1995 federal tax returns, Plaintiff's 1995 combined gross income was $76,168.00. (Ex. D-9). This amount includes Plaintiff's husband's annual income of approximately $47,000.00 as well as $4,000.00 of income derived from investments. No evidence was presented documenting the annual expenses of Plaintiff and her spouse. Both Plaintiff and her spouse are employed currently, receive income substantially similar to 1995, and have the ability to maintain this income in

[1] The decree was amended during a period when the oldest child lived with the Debtor. At that time, Debtor's payments in support of his daughter were abated until the oldest child turned eighteen. The amendment has no bearing on this matter since Debtor is current with his child support and the only disputed issue concerns the dischargeability of a property settlement with the Plaintiff.

the future.

Debtor currently works as a police officer for the Vidalia Police Department. As revealed by his 1996 W-2 tax form, Debtor earned pre-tax wages of $20,623.32 in 1996. (Ex. D-4). Debtor's spouse, Samantha Osburn, earns approximately $23,000.00 per annum.[2] At the time of filing, Debtor's Schedules I and J listed monthly income of $1,226.89 and incurred expenses of $1,549.01. According to Debtor's testimony at trial, not included within Debtor's listed monthly expenses is monthly charges of $369.00 for maintaining his children's horses, $49.85 for satellite television, $25.00 for home maintenance, $160.00 for commuting, an increase in auto insurance, and an increase in his phone bill. Debtor's wife is within six semesters of a college degree. Debtor testified that his monthly expenses now total $2,623.06. Debtor further testified that his wife's net monthly income was $1512.97 per month. Both Debtor and his spouse are employed currently, receive income substantially similar to 1996, and have the ability to maintain this income in the future.

Legal Framework of Domestic Issues in Bankruptcy

11 U.S.C. Sections 523(a)(5) and (15) provide:

> (a) A discharge under section 727, 1141, 1228[a] 1228(b), or 1328(b)[3] of this title does not discharge an individual debtor from any debt--
>
> (5) to a spouse, former spouse, or child of the debtor,

[2] This amount was derived by subtracting Debtor's 1996 gross income as revealed by his W-2 (Ex. D-4) from his combined gross income of $43,614.00 as listed on his 1996 federal tax return (Ex. D-8) which he filed jointly with his wife, Samantha Osburn.

[3] 11 U.S.C. Section 1328(a)(2) excepts Section 523(a)(5) debts but does not except Section 523(a)(15) debts.

> for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that--
>
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;
>
> (15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless--
>
> (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or
>
> (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor;

Prior to the enactment of subsection (15), the determination of whether a debt was considered support, either in the form of alimony or child support, was dispositive. If the debt was held to be alimony or child support then it was non-dischargeable. If not, then it was not within an exception and was therefore discharged. 11 U.S.C. §§ 727, 523. A bankruptcy court was only to perform a "simple inquiry" to determine if the debt could be legitimately

characterized as support at the time of the divorce. *See* In re Harrell, 754 F.2d 902 (11th Cir. 1985).

The passage of subsection (15) introduces a far different analytical exercise. If a debt fails to qualify under Harrell as being actually in the nature of support, Section (15) provides that there is no *per se* rule discharging the debt. Rather, a bankruptcy court must engage in a two-part test (1) to determine debtor's current ability to pay, and (2) to balance the relative benefit and detriment of a discharge.

First, it is important to note that a true pre-petition division of property, which is not subject to challenge as a voidable preference or fraudulent conveyance, is unaffected by bankruptcy. Thus, if title to property is awarded through the course of domestic relations proceedings that award ordinarily will be unaffected. *See* Bush v. Taylor, 912 F.2d 989 (8th Cir. 1990); *see also* Matter of Hall, 51 B.R. 1002 (S.D.Ga. 1985) (holding that under Georgia divorce law property delivered to a spouse upon "equitable distribution" becomes the sole and separate property of that spouse). The typical issue, however, is whether an order requiring a debtor to pay a debt that encumbers an award of property made during divorce proceedings is dischargeable.

Because of a strong state interest in domestic relations matters, bankruptcy courts are to grant great deference in deciding cases involving divorce, alimony, child support, child custody, establishment of paternity, etc. *See* Carver v. Carver, 954 F.2d 1573, 1579 (11th Cir. 1992) ("Nor was it the intent of the new Bankruptcy Code to convert the bankruptcy

courts into family or domestic relations courts - courts that would in turn willy-nilly, modify divorce decrees of state courts insofar as these courts had previously fixed the amount of alimony and child support obligations of debtors").

I. Burden of Proof

The burden of proof in establishing the Section 523(a)(5) or (15) exception is on the non-debtor spouse, *see* Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). However, although exceptions from discharge are normally construed strictly against the objecting creditor in order to provide the debtor with a "fresh start," *see* In re St. Laurent, 991 F.2d 672, 680 (11th Cir. 1993), policy considerations require a bankruptcy court to construe domestic relations exceptions more liberally. *See* In re Kline, 65 F.3d 749, 751 (8th Cir. 1995); In re Miller 55 F.3d 1487, 1489 (10th Cir. 1995).

Because of passage of Section 523(a)(15), all debts arising from a divorce or separation agreement or a decree are *prima facie* non-dischargeable. Matter of Cleveland, 198 B.R. 394, 397 (Bankr.N.D.Ga. 1996). Under Section 523(a)(5), the non-debtor spouse must show that the obligation in issue is actually in the nature of support whereas under Section 523(a)(15), the non-debtor spouse must only show that the debt was incurred during the course of a divorce or separation. *See* In re Stone, 199 B.R. 753, 783 (Bankr.N.D.Ala. 1996). If this burden is met, the burden of going forward shifts to the debtor to either rebut the evidence or offer a *prima facie* case in support of either exception, 11 U.S.C. § 523(a)(15)(A) or (B). *See* Id. at 783; In re Gantz, 192 B.R. 932, 936 (Bankr. N.D. Ill. 1996); In re Anthony, 190 B.R. 429, 432 (Bankr.N.D.Ala. 1995). The ultimate burden remains with the creditor seeking to

except the debt from discharge. *See* In re Stone, 199 B.R. at 783. The relevant time for making the Section (a)(5) analysis is the time of the decree, *see* In re Harrell, 754 F.2d at 902, and the Section (a)(15) analysis is the date of the trial in bankruptcy. *See* In re Dressler, 194 B.R. 290 (Bankr.D.R.I. 1996); In re Morris, 193 B.R. 949, 952 (Bankr.S.D.Cal. 1996).

II. Section 523(a)(15)

The parties stipulate that the issue here arises under Section 523(a)(15).

(a) Section 523(a)(15)(A); Ability to Pay

Under Section 523(a)(15)(A), an obligation arising from a division of property may be discharged if a debtor can demonstrate that he does not have the ability to pay such debt due to other reasonably necessary expenses. In these instances, courts have adopted a twofold analysis. First, using the disposable income test, a court must determine "whether the debtor's budgeted expenses are reasonably necessary." *See* In re Hill, 184 B.R. 750, 755 (Bankr.N.D.Ill. 1995). Second, Section 523(a)(15)(A) requires a court to consider a debtor's "ability to pay." 11 U.S.C. 523(a)(15). In that regard, a court must view the debtor's general "ability to pay" and not permit the debtor to rely on a "snapshot" of his financial abilities at the time of filing. *See* In re Smither, 194 B.R. 102, 107 (Bankr.W.D.Ky. 1996) (holding that court must consider prospective earning capacity rather than a snapshot); In re Anthony, 190 B.R. 433 (Bankr.N.D.Ala. 1995). If, after excluding expenses reasonably incurred, a court determines that a debtor does not have the "ability to pay," the debt is discharged. If the debtor possesses the "ability to pay," the debtor still may attempt to discharge the debt

pursuant to Section 523(a)(15)(B).

(b) 523(a)(15)(B); Balancing Benefit/Detriment

Alternatively, under Section 523(a)(15)(B), a debtor may discharge the obligation if it is demonstrated that the benefit of a discharge outweighs the detrimental consequences to the objecting party. This section essentially requires a court to "balance the equities" by considering a number of factors, including income and expenses of both parties; whether the non-debtor spouse is jointly liable on the debts; the number of dependents; the nature of the debts; the reaffirmation of any debts; and the non-debtor spouse's ability to pay. *See* In re Hill, 184 B.R. at 756.

III. Partial Discharge

Courts are split when determining whether to permit a partial discharge pursuant to Section 523(a)(15)(A) because a debtor may possess only the "ability to pay" a portion of the indebtedness. Most courts hold that the language of the statute does not provide for a partial discharge and, therefore, discharge pursuant to 523(a)(15) should follow an "all or nothing" approach. *See* In re Silvers, 187 B.R. 648, 649 (Bankr.W.D.Mo. 1995); In re Taylor, 191 B.R. 760, 767 (Bankr.N.D.Ill. 1996). However, some courts attempt to fashion an equitable remedy by discharging only the portion of the debt that the debtor has no "ability to pay." *See* In re Comisky, 183 B.R. 883, 884 (Bankr.N.D.Cal. 1995); Matter of McGinnis, 194 B.R. 917, 921 (Bankr.N.D.Ala. 1996). After considering both lines of authority, I hold that because of the language of the statute, considerations of comity, and the fact that a party may still modify a support decree in State Court after a Section 523 determination, a partial

discharge should not be permitted.

IV. Modification of State Decree Post Discharge

This Court also recognizes that pursuant to the state law of Georgia parties may modify a divorce decree upon a "showing a change in the income and financial status of either former spouse." O.C.G.A. 19-6-19. Clearly, a discharge of a debtor's divorce obligation changes that spouse's financial status and, therefore, may be relied upon in a state court proceeding to modify a divorce decree without violating the discharge injunction of 11 U.S.C. Section 524. *See* In re Siragusa, 27 F.3d 406 (9th Cir. 1996) (holding that post-bankruptcy alimony modification does not violate discharge injunction).

CONCLUSIONS OF LAW

Under Section 523(a)(15)(A), an obligation arising from a division of property may be discharged if a debtor can demonstrate that debtor does not have the ability to pay such debt due to other reasonably necessary expenses. In these instances, courts have adopted the disposable income test to determine "whether the debtor's budgeted expenses are reasonably necessary." In re Hill, 184 B.R. at 756; In re Huddelston, 194 B.R. 681, 686 (Bankr.N.D.Ga. 1996). After reviewing the evidence, I hold that all of Debtor's listed expenses are not reasonable and necessary.

At the time of filing, Debtor's Schedules I and J listed monthly income of $1,226.89 and incurred expenses of $1,549.01. At the time of trial, Debtor testified that his monthly combined income was $2,743.09 and expenses were $2,623.06. However, within this

list of expenses, Debtor testified that he included an expense of $369.00 to maintain his children's horses. I find that expense to be unreasonable in the context of determining whether Debtor has the ability to repay the debt.[4] Accordingly, Debtor's reasonable expenses as of the date of trial were approximately $2,254.06.

After reviewing Debtor's financial situation, I hold that he has the ability to pay $75.00 per week until January 1, 2006. Specifically, as mentioned previously, Debtor's combined income is $2,743.09 whereas his combined reasonable expenses are only $2,254.06. Additionally, beginning August of 1997, Debtor will no longer incur a child support expense of $332.50. Accordingly, pursuant to Section 523(a)(15)(A), Debtor has the ability to pay $75.00 per week to his ex-wife.[5]

Unlike Section 523(a)(15)(A) which requires a court to analyze only a Debtor's "ability to pay," pursuant to Section 523(a)(15)(B) a court must balance the equities to determine if the benefit to the Debtor outweighs the harm to the ex-spouse; if so, the debt is discharged. In this case, the equities favor discharge of the obligation.

Debtor's income is approximately $20,000.00 whereas Mrs. Farmer earns approximately $25,000.00. If the obligation is not discharged, Mrs. Farmer's income would

---

[4] Although within his expenses Debtor included a $300.00 housing payment for a trailer and land titled solely in debtor's spouse, I do not find that expense unreasonable since debtor has included his spouse's net income of $1,512.97 within his total income.

[5] As reflected by Debtor's schedules and supported by his testimony at trial, the main debt in this bankruptcy is the $40,500 debt to the Plaintiff. Debtor listed other unsecured debt totaling $13,855.31, which presumably will be discharged, and testified that all of his secured debt had been paid off by the time of trial.

increase by $75.00 per week or $3,900.00 annually and Mr. Osburn's income would decrease by a corresponding amount. Both parties appear to live by modest standards. After discharge, Debtor will be completely free of all other indebtedness. Mrs. Farmer did not introduce any evidence of significant debt and, therefore, this court will not assume any.[6] However, Mrs. Farmer's spouse earns approximately twice as much as Debtor's spouse. Her household income is $76,000.00 annually, contrasted with Debtor's $43,000.00. Although Congress may have primarily intended to prevent the discharge of property settlements by "high income" debtors, in instances where the debtor's ex-spouse is in a substantially better financial position than the debtor, a payment which is in the nature of a property settlement is dischargeable under 11 U.S.C. Section 523(a)(15)(B).

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Debtor's obligation to Plaintiff to pay $75.00 per week until January 1, 2006, under the divorce decree issued on October 22, 1994, *nunc pro tunc* September 30, 1994, is discharged.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of September, 1997.

[6] In fact, as reflected by Mrs. Farmer's 1995 tax returns, Mr. and Mrs. Farmer earned approximately $4,000.00 in investment income in 1995.